### Nos. 18-1686, 18-1771

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC Petitioner/Cross-Respondent

v.

## NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner

\_\_\_\_\_

## ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL APPENDIX

\_\_\_\_

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# UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD SETTLEMENT AGREEMENT

IN THE MATTER OF AIRGAS USA, LLC

Case 09-CA-152301

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS:

POSTING OF NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and in additional languages if the Regional Director decides that it is appropriate to do so. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in prominent places around its facility, including all places where the Charged Party normally posts notices to employees. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting.

**COMPLIANCE WITH NOTICE** — The Charged Party will comply with all the terms and provisions of said Notice.

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

Yes /s/ MCM	No .	
Initials	Initial	S

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director.

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board

of such non-compliance without remedy by the Charged Party, the Regional Director will issue a Complaint that includes the allegations covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

Charged Party	Charging Party		
AIRGAS USA, LLC		STEVEN WAYNE ROTTINGHOUS	E JR.
By: Name and Title	Date	By: Name and Title	Date
/s/ Michael C. Murphy Senior Director Labor Relations &	8.27.15	/s/ Steven Wayne Rottinghouse, Jr.	9-1-15
Labor Counsel Mr. Michael C. Murphy, Attorney		, in the second	
for Airgas USA, LLC		Mr. Steven Wayne Rottinghouse, Jr.	
Recommended By:	Date	Approved By:	Date
/s/ Daniel Goode	9/3/15	/s/ Garey Edward Lindsay	Sept. 3, 2015
DANIEL GOODE, Field Attorney	1	Garey E. Lindsay, Regional Director, Region 9	

FORM NLRB-472: (6-09)



# NOTICE TO EMPLOYEES



# POSTED PURSUANT TO A SETTLEMENT AGREEMENT APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

#### FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- · Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT threaten to change how we enforce our disciplinary procedure because you filed charges with the National Labor Relations Board or because of your participation in the National Labor Relations Board process.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

AIRGAS USA, LLC
(Employer)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a> and the toll-free number (866)667-NLRB (6572).

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer,

550 MAIN ST

RM 3003, CINCINNATI, OH 45202-3271

Telephone: (513)684-3686

Hours of Operation: 8:30 a.m. to 5 p.m.

Joint Ex 5(d)

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

AIRGAS USA, LLC

and

Case 09-CA-158662

STEVEN WAYNE ROTTINGHOUSE, JR., an Individual

# RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the National Labor Relations Board's Rules & Regulations, Respondent Airgas USA, LLC ("Airgas" or the "Employer") respectfully submits the following exceptions to the July 7, 2016 Decision issued by Administrative Law Judge Donna N. Dawson in the above-captioned case ("ALJD").

- 1. Respondent excepts to the ALJ's finding on p. 2, lines 39-40 and p. 3, line1 that "[t]he drivers are not responsible for securing the cylinders/tanks inside these cradles" because this finding is contrary to the record evidence. (GC Exh. 6, pp. 3-7).
- 2. Respondent excepts to the ALJ's finding on p. 3, line 40 that charging party Steven Rottinghouse ("charging party" or "Rottinghouse") "is one of the Respondent's experienced commercial drivers" since the record evidence does not support the characterization of Rottinghouse as "experienced."

3. Respondent excepts to the ALJ's finding on p. 4, line 5 that "Rottinghouse was an active member of the union" since the record evidence does not support this finding.

- 4. Respondent excepts to the ALJ's finding on p. 4, fn. 6, that the settlement in Case 09-CA-152301 "included a notice posting that Respondent would not 'threaten to change' its discipline policy due to prior charges or participation on the Board process; it did not contain a nonadmissions clause" because Counsel for the General Counsel never gave Respondent notice that this settlement agreement (as opposed to the original charge itself and/or the alleged conduct underlying the charge) would be raised or relevant to this case and therefore deprived Respondent of the right and ability to provide rebuttal testimony regarding the circumstances of the Employer entering this settlement agreement; furthermore, the Complaint in this case did not allege a violation of this settlement agreement.
- 5. Respondent excepts to the ALJ's finding on p. 5, lines 24-25 that Froslear "admitted" that the cylinders "did not fall down" because this finding is unsubstantiated by the record evidence and contrary to the record evidence which is devoid of the term "fall down" and does not support an inference that Froslear "admitted" to anything.
- 6. Respondent excepts to the ALJ's finding on p. 5, lines 30-31 that "Froslear physically examined or even touched the cylinders" as irrelevant since the record evidence establishes that the cylinders moved.
- 7. Respondent excepts to the ALJ's finding on p. 6, line 7 that the improperly strapped cylinders were leaning "slightly" since this finding is not substantiated by the record evidence and is irrelevant insofar as the ALJ also found that the cylinders moved and were not properly secured.

8. Respondent excepts to the ALJ's findings on p. 5, lines 20-34 since the findings are based on a misreading of the word "fall" as "fall down, insertion of the word "admits" that does not appear in the transcript and on unsupported conclusion that physical inspection of cylinders was relevant.

- 9. Respondent excepts to the ALJ's findings on p. 10, lines 41-47 and p.11, lines 1-5 as not supported by the record evidence.
- 10. Respondent excepts to the ALJ's findings on p. 11, lines 30-34 as not supported by the record evidence.
- 11. Respondent excepts to the ALJ's findings on p. 12, lines 1-19 as not supported by the record evidence.
- 12. Respondent excepts to the ALJ's findings on p. 13, lines 1-15 and 23-29 as not supported by the record evidence.
- 13. Respondent excepts to the ALJ's findings on p. 18, lines 1-19 since the ALJ makes no reference to the required showing of a causal connection.
- 14. Respondent excepts to the ALJ's finding on p. 19, lines 24-43, p. 19, lines 1-47, p. 20, lines 1-47, p. 21, lines 1-40, p. 22, lines 1041, p. 23, lines 1-29 as not supported by the record evidence and applicable case law.

## RESPECTFULLY SUBMITTED this 4th day of August, 2016

AIRGAS USA, LLC

Michael C. Murphy

Airgas, Inc.

259 N. Radnor-Chester Road

Radnor, PA 19087

(610) 230-3077

michael.murphy@airgas.com

#### CERTIFICATE OF SERVICE

I certify that a copy of Respondent's Post-Hearing Brief was electronically served on all parties in the manner listed below:

Garey E. Lindsay (by E-Filing) Regional Director National Labor Relations Board, Region 9 3003 John Weld Peck Federal Building 550 Main Street Cincinnati, Ohio 45202-3271

Erik P. Brinker (by Email) Counsel for the General Counsel Region 9, National Labor Relations Board 3003 John Weld Peck Federal Building 550 Main Street Cincinnati, Ohio 45202-3271

Steven Wayne Rottinghouse (by UPS Overnight Mail) 4221 Harding Avenue Cincinnati, OH 45211

DATED this 4th day of August, 2016

Michael C. Murphy

Airgas, Inc.

259 N. Radnor-Chester Road

Suite 100

Radnor, PA 19087

(610) 230-3077

michael.murphy@airgas.com

### **CERTIFICATION**

Pursuant to 6th Cir. R. 30(b)(4)(E), I certify that all documents included in the Supplemental Appendix are copies of documents that are properly part of the record.

/s/ Linda Dreeben Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street SE Washington, DC 20570

Dated at Washington, DC this 17th day of October 2018

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC	)		
Petitioner/Cross-Respondent	)		
	)	Nos.	18-1686
V.	)		18-1771
	)		
	)		
NATIONAL LABOR RELATIONS BOARD	)		
	)		
Respondent/Cross-Petitioner	)		

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben Linda Dreeben Deputy Associate General Counsel National Labor Relations Board 1015 Half Street, SE Washington, DC 20570

Dated at Washington, DC this 17th day of October, 2018